

May v City of New York
2020 NY Slip Op 30477(U)
February 12, 2020
Supreme Court, New York County
Docket Number: 160346/2015
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 21

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Avner May,

Plaintiff,

Index No. 160346/2015

-against-

City of New York, Consolidated Edison Company
of New York, New York City Transit Authority
and Reed A. Retting,

Defendants.

Mot. Seq. 2

DECISION AND ORDER

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYSCEF #
Plaintiff's Motion/ Affirmation/Memo of Law	<u>1</u>	40-50
Defendant's Affirmation in Opposition	<u>2</u>	66
Plaintiff's Reply Affidavit	<u>3</u>	68
Defendant's Supplemental Affirmation in Opposition	<u>2</u>	85
Plaintiff's Supplemental Affirmation	<u>2</u>	88-90

LISA A. SOKOLOFF, J.

This is an action for personal injuries sustained by Plaintiff Avner on October 19, 2014 at approximately 3:30 p.m. while he was riding his bicycle eastbound on the 96th Street Transverse in Central Park and was struck in the rear by a bus owned by Defendant New York City Transit Authority (Transit) and operated by co-Defendant, Reed A. Retting (collectively, TA Defendants).

Plaintiff moves against the TA Defendants for partial summary judgment on liability and their first affirmative defense of culpable conduct. Plaintiff contends that a rear-end collision creates a *prima facie* case of liability for the TA Defendants. In support of his motion, Plaintiff submitted affirmation of counsel, his own deposition testimony, deposition testimony of Defendant Reed Retting, and the police report. It is undisputed that along the Transverse there is one lane of traffic in each direction, a double yellow line that separates the eastbound and west lane, and no bike lanes.

Plaintiff testified that "after coming out of the underpass I saw ahead of me that there was a rough patch of pavement including both a manhole cover and a storm drain and I moved to the left to avoid passing over that rough patch of pavement," all within the bounds of the roadway. Plaintiff further testified that there was traffic coming in the opposite direction just before the accident occurred. Just prior to the impact, Plaintiff was traveling approximately 10 to 15 miles an hour. Plaintiff testified that he had proceeded 20 feet in front of the manhole cover when Defendant's bus hit his back tire. Plaintiff was not aware of the bus until the impact, nor did he hear the sound of a horn. The front wheel of the bus passed over Plaintiff's bicycle and right foot. Once the bus hit him, Plaintiff fell to his right, approximately five to ten feet from the sidewalk nearest to him, and still in the same lane of travel that he was in while riding his bicycle.

In opposition, the TA Defendants contend that Plaintiff made an erratic, unexpected and sudden move into the path of the bus, immediately in front of the bus, without warning. According to his deposition testimony, the bus driver first saw the cyclist when he was 40 feet in front of the bus and "gave a slight toot of the horn" to warn the cyclist. The driver testified that the bus was traveling 25 miles per hour when he first saw cyclist and that he slowed to 15 miles per hour. When the bus driver saw the cyclist change direction, Plaintiff was 20 feet away. The bus driver acknowledged that it was "a very narrow road," but did not know, and was unable to estimate, how far Plaintiff moved left in relation to the eastbound lane. The driver testified that to avoid the cyclist, he moved the bus to the left, crossing over the double line. He did not know the speed of the bus at the time of impact.

It is well-settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing

sufficient evidence to demonstrate the absence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, at 324). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The New York State Vehicle and Traffic Law (VTL) provides certain "Rules of the Road" governing the manner in which vehicles must be operated in the State of New York (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102 [2015]). A bicycle is considered a vehicle pursuant to VTL § 1231.

- VTL § 1129 (a) provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such a vehicle and the traffic upon and the condition of the highway."
- VTL § 1180 (a) provides: "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing."
- VTL § 1122-a provides: "The operator of a vehicle overtaking, from behind, a bicycle proceeding on the same side of a roadway shall pass to the left of such bicycle at a safe distance until safely clear thereof."
- VTL § 1146(a) provides in pertinent part: "Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary."

To prevail on a motion for summary judgment, the movant has the initial burden of establishing that the Defendant's violation of a traffic law was the sole proximate cause of the accident (*McDaniel v Codi Transp., Ltd.*, 149 AD3d 595 [1st Dept 2017]).

The uncontested testimony is that Plaintiff was riding his bicycle, in his lane of travel, when he was struck from behind by Defendant's bus. The Appellate Division has consistently held that a rear-end collision creates a *prima facie* case of liability with respect to the operator of the moving vehicle, imposing a duty of explanation on its operator. This liability can attach to the rear vehicle regardless of whether the (a) lead vehicle stopped suddenly (*Chowdhury v Matos*, 118 A.D.3d 488 [1st Dept 2014]), (b) lead vehicle stopped suddenly in heavy traffic (*Diller v City of New York Police Dept.*, 269 AD2d 143 [1st Dept 2000]), (c) front vehicle stops suddenly in slow-moving traffic (*Mascitti v Greene*, 250 AD2d 821 [2nd Dept 1998]), even if the sudden stop is repetitive (*Leal v Wolff*, 224 AD2d 392 [2nd Dept 1996]), (d) front vehicle stopped suddenly in ordinary traffic (*Bando-Twomey v Richheimer*, 229 AD2d 554 [2nd Dept 1996]) (e) front vehicle, although in stop-and-go traffic, stopped while crossing an intersection (*Barba v Best Sec. Corp.*, 235 AD2d 381 [2nd Dept 1997]), and (f) front car stopped while after having changed lanes (*Cohen v Terranella*, 112 AD2d 264 [2nd Dept 1985]). Here, the record supports a finding that Defendant bus driver struck the rear of Plaintiff's bike because he failed to maintain a safe distance as required by statute and case law (*Johnson v Phillips*, 261 AD2d 269 [1st Dept 1999]).

Accordingly, Plaintiff met his *prima facie* burden by demonstrating that the bus driver failed to exercise due care by following the bicycle more closely than was reasonable, driving at a speed that was greater than was prudent and attempting to pass Plaintiff's bicycle without maintaining a safe distance, in violation of Vehicle and Traffic Law §§ 1129(a), 1180(a), 1122-a, and 1146 (a) and that Plaintiff did not contribute to the accident (*Carthen v Sherman*, 169 AD3d 416 [1st Dept 2019]).

Defendant has failed to offer any reason why he simply did not apply his brakes and wait until it was safe to pass Plaintiff or otherwise maintain a proper distance from the rear of the cyclist. Since Defendant was under a duty to maintain a safe distance between his bus and Plaintiff's bicycle, his failure to do so, in the absence of a nonnegligent explanation, constitutes negligence as a matter of law (*Delgado v Martinez Family Auto*, 113 AD3d 426 [1st Dept 2014]; *Pace v Robinson*, 88 AD3d 530 [1st Dept 2011]; *Watson v Narayanan*, 149 AD3d 1012 [2nd Dept 2017]). Defendant's argument that Plaintiff created an emergency situation by attempting to avoid the rough patch that resulted in the accident is without merit.

Accordingly, it is

ORDERED, that branch of Plaintiff's motion seeking to strike the first affirmative defense of the TA Defendants is granted; and it is further

ORDERED, Plaintiff's motion for partial summary judgment is granted; and it is further

ORDERED, that Plaintiff's counsel shall serve a copy of this order, with notice of entry, on counsel for all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within 30 days after entry of this order onto NYSCEF, and that the Clerk is directed to enter judgment in favor of Plaintiff as against Defendants New York City Transit Authority and Reed A. Retting (only); and it is further

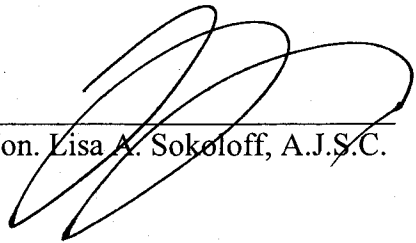
ORDERED, that service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in

the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases.*

Any requested relief not expressly addressed herein has nonetheless been considered and is expressly denied.

Dated: February 12, 2020
New York, New York

ENTER:



Hon. Lisa A. Sokoloff, A.J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

CHECK IF APPROPRIATE: